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Supreme Court, U.S.
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No. 95-2071

In The

Supreme Court of the United States

October Term, 1995

DAVID HARGETT,

Petitioner,

vs.

NATIONAL WESTMINSTER BANK, USA, GORDON OLIOSI and ROGER GOLDMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Does there exist a conflict among the decisions of the United States Courts of Appeals on the issue whether a jury in an employment discrimination action may consider the relative positions within an organization of individuals to whom a plaintiff contends he is "similarly situated" when deciding if the reason proffered by his employer for his termination was pretextual?

2. Should this Court exercise its discretionary jurisdiction to hear the issue whether the trial and appellate courts erred in holding that a *Price Waterhouse* mixed motive jury charge was not appropriate given the evidence presented, where there is no conflict among the United States Courts of Appeals on the law as stated by the lower courts?

STATEMENT PURSUANT TO RULE 29(6)

On May 1, 1996, National Westminster Bank, USA ("NatWest") became a wholly-owned subsidiary of Shawmut New York Corporation ("Shawmut"). At that time, NatWest merged with Fleet Bank of New York, National Association and is presently doing business as Fleet Bank, National Association. Shawmut is a wholly-owned subsidiary of Fleet Financial Group, Inc.

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Respondents National Westminster Bank, USA ("NatWest" or the "Bank"), Gordon Oliosi and Roger Goldman request that the Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit which affirmed the judgment of the United States District Court for the Southern District of New York dismissing the complaint after a jury trial.

SUMMARY OF ARGUMENT

Petitioner, a high-ranking Vice President at the Bank, instituted this action alleging that his termination resulted from racial discrimination in violation of 42 U.S.C. § 1981 and the New York Executive Law.[1] The jury returned a verdict in which it found that petitioner failed to prove that respondents had intentionally discriminated against him based on his race when he was terminated after it came to senior management's attention that a stripteaser had performed at an afternoon business meeting presided over by him. Indeed, petitioner was discharged by the very same executive of NatWest — his supervisor, respondent Oliosi — who had hired him just six months earlier. The district court entered judgment dismissing the complaint against all respondents on February 14, 1995. Petitioner then appealed to the Second Circuit.

Petitioner argued on appeal that the district court erred (a) when it issued a jury instruction on the issue of "pretext" that allowed the jury to consider the positions held by other, lower-ranking employees in determining whether they were "similarly situated" to petitioner; and (b) when it refused to issue a "mixed motive," burden-shifting charge consistent with this Court's

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1. Petitioner also asserted three pendent state law claims, which were dismissed by the trial court prior to submission to the jury.

decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1984).[2]

Petitioner contended with regard to the "pretext" issue that his white supervisor (a Senior Vice President who allegedly was aware that a woman wearing a "bathing suit" was to serve cake at petitioner's meeting) and two lower-level white branch managers (who were present at after-hours parties on the Bank's premises at which such "dancers" appeared) were "similarly situated" to him. He assigned as error the fact that the court's charge permitted the jury to consider these other employees' positions in the corporate hierarchy in determining whether they were "similarly situated" to him.

With regard to the "mixed motive" charge, petitioner asserted on appeal that the evidence proffered by him of two comments allegedly made by respondent Goldman during petitioner's preemployment interview (that NatWest was a "very vanilla" organization and that Mr. Goldman would protect petitioner from any unfair treatment he might experience based on his race) required the *Price Waterhouse* charge. Petitioner argued that the district court had abused its discretion by refusing to include the charge in its instructions to the jury.

The Second Circuit affirmed the judgment in all respects. This petition for a writ of certiorari followed.

Petitioner simply errs when he contends that the writ should be issued because there exists an alleged "split" among the United States Courts of Appeals on the issue of the meaning of "similarly situated in employment discrimination cases."

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2. Petitioner also assigned as error the district court's refusal to admit into evidence a document allegedly written by a witness who was unavailable at trial. Because petitioner has not requested that the Court issue a writ on the issue of this evidentiary ruling, it will not be further addressed herein.

Further, he fails to state any basis for granting the petition with respect to the alleged error concerning the mixed motive charge other than his apparent disagreement with the district court's application of the rule of law enunciated in *Price Waterhouse v. Hopkins* to the evidence presented at trial.

Because the decisions of the United States Courts of Appeals, including the Second Circuit here, have been consistent on the definition of "similarly situated" and because the trial court properly declined to instruct the jury on the "mixed motive" issue, the petition for a writ of certiorari should be denied.

COUNTER STATEMENT OF THE CASE

Petitioner, a black male, was hired away from an officer-level position at Citibank by respondents Oliosi and Goldman to be a Vice President with NatWest on November 13, 1991 at a salary of $95,000. (Trial Transcript 83:1-14; 94:21-95:3; 96:6-21; 98:10-14; 247:10-14.[3]) He was assigned to NatWest's Community Banking Group (its branch bank network) as "Area Director" of the Manhattan Central area, one of the most prestigious geographic areas at NatWest. (Tr. 98:15-99:9.) Managers of bank branches, some of whom were themselves Vice Presidents, reported to him in his capacity as Area Director. (Tr. 606:10-20; 621:9-25.)

The events concerning petitioner's discharge — which was evidently accepted by the jury in finding for the defendants — are as follows:

On February 11, 1992, petitioner allowed a female "entertainer" to perform a striptease act at a monthly Branch

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3. Cited pages of the Trial Transcript are hereinafter referred to as "Tr."

Managers' meeting (the "February 11 Meeting"). The meeting was presided over by petitioner in the midst of the workday in a NatWest conference room and attended by petitioner's subordinates and guest employees. (Tr. 606:21-610:11; 622:12-629:4; 703:11-706:15; 718:21-719:25; 737:16-740:21.) At the conclusion of the performance, the "entertainer" was wearing only a black lace-type brassiere and a "G-string." (Tr. 609:17-19; 627:14-20; 706:10-15; 719:24-25; 739:20-24.)

It was not until a few weeks later that the event came to the attention of NatWest management when an anonymous letter of protest was sent to the Vice President of Human Resources for the Community Banking Group, Barbara Hahn. (Tr. 463:6-12; 762:23-763:11-18.) Separate investigations into the event were conducted by Mr. Oliosi and, at the request of the Chairman and Chief Executive of NatWest, an independent investigation was undertaken by a Senior Vice President of Human Resources. (Tr. 465:20-466:2; 466:24-467:5; 493:16-494:20; 630:23-635:5; 707:25-708:8; 773:11-774:10, 20-24.) Both investigations confirmed that a "dancer" had performed a striptease at the February 11 Meeting. Although present throughout, petitioner made no effort to stop this "performance." (Tr. 611:1-5.) After the stripper departed, petitioner continued the business meeting. (Tr. 612:19-613:22; 635:13-636:8; 774:4-10, 20-24.)

Following his investigation, Mr. Oliosi decided with the approval of his superior, Mr. Goldman, Executive Vice President and Corporate Head of the Community Banking Group, that due to petitioner's blatant violation of numerous Bank policies, the offensive nature of this display and petitioner's utter lack of professional judgment, NatWest would terminate petitioner's employment effective April 6, 1992. (Tr. 153:15-23; 154:10-20; 238:20-25.)

This action was commenced on or about June 30, 1993. The claims presented to the jury alleged that petitioner was wrongfully discharged on the basis of his race in violation of 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("Section 1981"), and N.Y. Exec. Law § 296(1)(a) (McKinney 1993) ("New York Human Rights Law").

Petitioner's theory on the discrimination claims was that "similarly situated" white employees had committed comparable transgressions and received less severe punishment than he. Specifically, petitioner offered evidence that a female Branch Manager, Anne St. Paul, who was an Assistant Vice President, had permitted a birthday party for one of the bank tellers to take place at her branch after it had closed for the day. (Tr. 358:19-359:3; 364:13-20.) At the party, a male "Chippendale"-type dancer performed. (Tr. 366:21-367:19.) After petitioner's termination, Ms. St. Paul advised Mr. Oliosi of this party that had occurred at her branch. (Tr. 372:20-373:3.) She was ultimately issued a verbal warning. (Tr. 373:12-23.)

The second incident involved another Branch Manager and Assistant Vice President, Robert Bisher, whose subordinates hired a belly dancer to perform as a surprise for him after his branch had closed on his last day prior to a transfer to a new location. (Tr. 311:22-313:1.) He received no reprimand from the Bank as a result of being "victimized" by this going-away joke.[4] (Tr. 314:19-20; 323:14-15.) Finally, petitioner testified at trial that he sent a note to Mr. Oliosi requesting approval to have a woman in a bathing suit serve cake at the February 11 Meeting. (Tr. 214:5-216:12.) Mr. Oliosi (who denied ever receiving the note or approving the dancer's appearance) was not disciplined in connection with the February 11 Meeting. (Tr. 588:2-7.)

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4. Ms. Hahn testified that she only learned about this incident at the trial in this action. (Tr. 473:23-474:4.)

Following a jury verdict and judgment entered dismissing the complaint against all respondents, petitioner, on March 8, 1995, appealed to the Second Circuit raising, *inter alia,* the following issues:

1. Whether the district court erred by instructing the jury that in determining whether "similarly situated" white employees were treated more favorably than petitioner, the jury may consider the positions in the corporate structure of such white employees relative to that of petitioner in addition to the alleged transgressions in which the white individuals were involved.

2. Whether the district court erred, in the absence of any evidence directly reflecting an unlawful discriminatory motive, by refusing to instruct the jury that the burden of proof should be apportioned in accordance with the "mixed motive" analysis articulated in this Court's *Price Waterhouse v. Hopkins* decision.

After hearing argument, the Second Circuit panel affirmed the judgment stating, on the first issue, that it agreed with respondents that "requiring higher ups to conform to a higher standard of decency is not contrary to established law and does conform to common sense." The court further found that since petitioner had offered evidence comparing himself with employees in higher as well as lower positions than he, the instruction did not necessarily disfavor him and was, therefore, not prejudicial.

With respect to the error assigned by petitioner on the second issue, the court found that because the only evidence offered by petitioner in support of the requested charge was the alleged preemployment conversation with Mr. Goldman in which he purportedly stated that NatWest was "very vanilla" and that he would protect the petitioner from any unfair treatment he

might experience at the Bank, it could not conclude that the district court had abused its discretion when it refused to include a "mixed motive" instruction in its charge to the jury.

The petitioner seeks this Court's review on a writ of certiorari of these same two issues.

REASONS FOR DENYING THE WRIT

Although the petition states that the writ should be granted "to resolve a split between the Federal Circuit Courts of Appeals on the important issue of determining when employees are 'similarly situated,' " there is *no* conflict among the circuit courts on either issue raised in the petition. Petitioner has stated no compelling reason why a writ of certiorari should be granted. He merely reargues the same factual matters which the jury decided against him and makes the identical legal arguments that were rejected by the two lower courts.

Respondents respectfully request that the Court decline to exercise jurisdiction and deny the petition for a writ of certiorari.

I

THERE EXISTS NO CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS ON THE ISSUES RAISED IN THE PETITION.

Rule 10 of the Rules of the Supreme Court of the United States ("Supreme Court Rules") makes clear that petitions for a writ of certiorari are granted only under the most compelling circumstances, as follows:

> Review on a writ of certiorari is *not a matter of right*, but of judicial discretion. A

> petition for a writ of certiorari will be granted *only for compelling reasons.*
>
> * * *
>
> A petition for a writ of certiorari *is rarely granted* when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rules, Rule 10 (emphasis added).

One circumstance enumerated in the Supreme Court Rules in which a petition for a writ may be granted is where "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." *Id.* Although petitioner contends that a conflict exists with regard to the pretext issue, the decisions he cites reveal no such conflict.

Indeed, the courts in a number of those decisions *did* consider the employment positions held by others allegedly "similarly situated" to the plaintiffs therein. The courts in the remaining decisions cited by petitioner did not address the positions held by others at all. Our research has not revealed any decision holding that the positions of other employees with whom a plaintiff compares herself or himself may *not* be considered in determining whether they are "similarly situated" to that plaintiff. Thus, there is no conflict among the courts of appeals on the first issue raised by petitioner.

With regard to the second issue of whether petitioner was entitled to a "mixed motive" charge, he does not even assert that there exists a conflict among the courts of appeals warranting

this Court's exercise of its discretionary jurisdiction, much less cite decisions that would create a conflict. Indeed, petitioner has failed to allege or establish *any* jurisdictional basis for this Court's review of this aspect of the district court's jury charge. Petitions for a writ of certiorari have been consistently denied in circumstances much more compelling than this, such as where a conflict *does* exist among the courts of appeals but the Court finds the issues not sufficiently "important" to issue a writ. *See, e.g., Haskins v. Virginia*, 484 U.S. 1037 (1988); *DeBardeleben v. United States*, 469 U.S. 1028 (1984); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392 (1923). Where, as here, the courts below applied a properly stated rule of law to the fact-specific case before it, further review by this Court is not warranted.

Because the petition fails to establish a basis for this Court's jurisdiction to issue a writ of certiorari, the petition should be denied in its entirety.

II

THE COURTS BELOW DID NOT COMMIT REVERSIBLE ERROR.

Notwithstanding the fact that petitioner has utterly failed to establish any basis to justify this Court's exercise of its discretion to grant the petition, there exists no substantive ground for reversing the decision of the Second Circuit or dismissing the judgment of the district court. Because the courts below acted properly in all respects, the petition should also be denied.

A. A Jury May Properly Consider the Employment Positions of Others in Determining Whether They Are "Similarly Situated" to Plaintiff

The Second Circuit found that the district court properly charged the jury to evaluate the evidence under the three-tier standard enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (the "*McDonnell Douglas/Burdine* standard").

This standard, applicable to petitioner's claims under both Section 1981 and the New York Human Rights Law, requires that a petitioner first prove by a preponderance of the evidence the following required elements to make out a prima facie case: (1) he is a member of a class protected by the statutes; (2) he was denied equal terms and conditions of employment as were white persons; and (3) the reasons for the denial of terms and conditions were based on his race. *Id. See also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir.), *cert. denied*, 506 U.S. 965 (1992); *Johnson v. Palma*, 931 F.2d 203 (2d Cir. 1991).

If the plaintiff proves each of the required elements by a preponderance of the evidence, the defendant must then merely state a legitimate, nondiscriminatory reason for its conduct toward plaintiff. Upon presentation of evidence by the defendant of legitimate, nondiscriminatory reasons for its actions, the plaintiff must then prove by a preponderance of the evidence that the reasons articulated by the defendant are a pretext and that race did play a determining role in the decision of which the plaintiff complains. If the plaintiff fails to prove by a preponderance of the evidence that the defendant's articulated reasons for its actions were a pretext for intentional discrimination, then judgment must be entered for the defendant. *Id.*

One manner in which a minority plaintiff may establish pretext is to prove that "similarly situated" white employees were treated more favorably than he or she. *See Henry v. Daytop Village, Inc.*, 42 F.3d 89 (2d Cir. 1994); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994). Petitioner took issue on appeal with the trial court's instruction on how the jury should evaluate whether other employees were "similarly situated" to him.

After charging the jury to evaluate the evidence under the three-tier *McDonnell Douglas/Burdine* standard, the district court explained the meaning of "similarly situated" relating to the issue of "pretext," as follows:

> It is for you to decide if the other individuals were similarly situated to the plaintiff. You may consider the *positions held and the conduct in question* in determining if the individuals were similarly situated. If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated employees did commit similar acts and were not terminated, then you may find defendants' reason pretextual.

(Tr. 1119:9-16) (emphasis added).

Petitioner assigned as error the fact that the district court permitted the jury to consider both (a) the *positions* held by the individuals he claimed were "similarly situated" to him; *and* (b) the *conduct* allegedly committed by them, in determining whether they were, in fact, "similarly situated" to the petitioner. His position is that it was error for the trial court to advise the jury that employees' job titles, positions or responsibilities are relevant in determining whether they might be "similarly

situated." Rather, petitioner contended that the jury could only consider the acts of the employees in deciding that issue. Petitioner's argument is that the standards of conduct as to all actions are identical for a bank's chairman, trust officers, personnel officers, drivers, cashiers and janitors, and thus, the jury cannot make any distinction as to the standards of appropriate conduct based on the individual's level in the corporate hierarchy.

As the Second Circuit properly found, this contention, which defies common sense, is an erroneous statement of the law. Moreover, the decisions cited by petitioner as purportedly creating a "split among the federal circuit courts" either support the proposition that an employee's job title may be properly considered on this issue or do not address the issue at all.

For example, petitioner's reliance on the United States Supreme Court decision in *McDonnell Douglas v. Green* for the proposition that the positions of the allegedly "similarly situated" employees may not be considered by the jury is misplaced and ignores the subsequent decisions of the United States Courts of Appeals construing *McDonnell Douglas* on the issue. In *McDonnell Douglas*, this Court never even addressed the question of whether other employees' positions should be considered when determining whether they are "similarly situated" to the plaintiff. Rather, in discussing the meaning of "pretext," this Court simply stated that it would have been "especially relevant" in establishing pretext if white employees involved in acts of "comparable seriousness" were treated differently. This statement does not imply that only acts of "comparable seriousness" may permissibly be considered, or that it would be erroneous for a jury to consider the various employees' positions and grades when considering the issue of "similarly situated" employees.

Moreover, as the subsequent decisions of the courts of appeals discussed below — including those cited by petitioner — make clear, it would be error *not* to instruct the jury that the relative positions of the employees in question should be considered in determining whether they were "similarly situated" to the petitioner.

The decisions are uniform in finding that a consideration of the relative positions of a plaintiff and those with whom he or she compares himself or herself is entirely appropriate in a disparate treatment discrimination action. *See, e.g., Henry*, 42 F.3d at 96; *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 972 (8th Cir. 1994); *Pierce*, 40 F.3d at 802; *Talley v. United States Postal Serv.*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984). In all of these decisions, the courts relied on the difference in the positions or rank of other employees when determining whether they were "similarly situated" to the plaintiff. Indeed, the very term "similarly situated" implies rank as well as the circumstances in which the employees are found.

In *Henry*, a disparate treatment race and gender discrimination action, the plaintiff alleged that the "similarly situated" white and male employees who had committed misconduct similar to that of which she, a black female, was accused, were disciplined less harshly than she. 42 F.3d at 94. In upholding the district court's entry of summary judgment against plaintiff on the issue, the Second Circuit held that eight of the ten employees were *not* "similarly situated" to the petitioner because they *either* held a "different occupational status" *or* engaged in conduct "different in kind" to that attributed to the petitioner.[5] 42 F.3d at 97. The Second Circuit in *Henry* made it clear that an employee who is not at the same

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5. The remaining two employees, while arguably "similarly situated," received the same disciplinary sanction as plaintiff. *Henry*, 42 F.3d at 97.

occupational status or level may not be "similarly situated" to the plaintiff, given the facts of the case.

Likewise, in *Pierce*, a "reverse" sex discrimination action, the Sixth Circuit considered the relative positions of the male and female employees at issue in determining that they were not "similarly situated" to the plaintiff, explaining, as follows:

> In order to show that he was "similarly situated" to [the female employee, the plaintiff] was required to prove that all of the relevant aspects of his employment situation were "nearly identical" to those of [the female employee's] employment situation. The following distinctions between [the female employee and the plaintiff] are undisputed: [the plaintiff] was a *supervisor* and [the female employee] was not; [the plaintiff] had *responsibility over three offices*, whereas [the female employee] was an "office administrator" with no supervisory control over any other employees; [the plaintiff] *evaluated employees*, including [the female employee] while [she] evaluated no one; and unlike [the female employee, the plaintiff] attended agency group meetings and was responsible for enforcement of the company's sexual harassment policy.
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> * * *
>
> Under these circumstances, the relevant aspects of his employment are not, as [the plaintiff] claims, "nearly identical" to

> [the female employee's] employment. Thus [the plaintiff] and [the female employee] are not "similarly-situated" employees. Because [the plaintiff] has presented no other evidence of disparate treatment of employees who are truly similarly situated, he has failed to satisfy the elements of his prima facie case. Accordingly, summary judgment was proper on [the plaintiff's] claim for reverse discrimination.

Pierce, 40 F.3d at 802, 804 (citation omitted) (emphasis added).

Indeed, even in the *Harvey v. Anheuser-Busch, Inc.* and *Talley v. United States Postal Service* decisions relied on by petitioner as creating a "split" among the circuit courts, the Eighth Circuit held that disparity in discipline was warranted given both the differences in the positions held by the plaintiffs and the persons with whom they compared themselves, *and* the transgressions committed by them.

In *Harvey*, a white security officer and his black sergeant came upon an apparently unconscious man while on patrol. 38 F.3d at 970. The black sergeant advised the white officer that he need not take any action and that the sergeant would report the incident to the police. *Id.* The sergeant neglected to do so, was suspended and ultimately fired. *Id.* at 971. The white officer was not terminated. The black sergeant brought suit claiming discrimination based on the disparity in the disciplinary treatment of the two individuals arising from the same failure to report. On appeal of summary judgment entered in favor of the employer, the Eighth Circuit affirmed. The court held that in view of the difference in the positions of the two individuals

along with the culpable conduct of each, they were not "similarly situated," as follows:

> Instances of disparate treatment can support a claim of pretext, but [the black sergeant] has the burden of proving that he and the disparately treated whites were " 'similarly situated *in all relevant respects*.' "
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> * * *
>
> [The black sergeant] argues that he presented evidence of pretext because [the white officer] was not terminated, while [the black sergeant] was suspended seven days and then discharged. We disagree. [The white officer] was [the black sergeant's] *subordinate*. [The black sergeant] instructed [the white officer] not to stop to assist the man lying on the sidewalk and later forgot to call the police. In these circumstances, *disparity in discipline was clearly warranted.*
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> * * *
>
> Thus [the white officer] and [the black sergeant] were not similarly situated for purposes of proving pretext.

Harvey, 38 F.3d 972 (citations omitted) (emphasis added). In this decision relied upon by petitioner, the court made it perfectly clear that both the varying positions as well as the offenses committed *were* to be considered in determining that the two individuals were not "similarly situated."

The Eighth Circuit reached the same result in the earlier *Talley* decision where it found that the plaintiff — a temporary, casual employee — was not "similarly situated" to the "career employees" with whom she compared herself based on the disparity in their employment positions *and* the fact that none of the career employees had repeatedly committed the same serious offense as did the plaintiff. 720 F.2d at 507.

Similarly, the Eighth Circuit decision in *Boner v. Board of Commissioners*, 674 F.2d 693 (8th Cir. 1982), fails to create the "split" in the federal circuit courts that petitioner alleges exists. In *Boner*, the court held that an employee with whom plaintiff compared himself was not "similarly situated" to him where (a) the offenses on which discipline was based were not comparable; and (b) the employee was qualified to perform his job competently and plaintiff was not. Although the court noted that the white employee with whom the plaintiff compared himself was a managerial employee and plaintiff was not, it did not comment on whether the difference in employment positions was relevant to its determination that the two were not "similarly situated."

In addition, the trial court here did not rule — as did the *Henry, Pierce* and *Harvey* trial courts — that as a matter of law the individuals with whom petitioner compared himself were not "similarly situated" to him. It merely instructed the jury that it may *consider* the positions held as well as the conduct in question in determining whether the other individuals were "similarly situated" to the petitioner. Not only did this instruction follow the authorities cited, it is consistent with logic and ordinary human experience that the higher an official is in the corporate hierarchy, the more stringent are the standards of conduct to which he is held. Simply put, the chief executive's language and behavior is not measured by the standards of the loading dock. Moreover, as the Second Circuit aptly noted,

because petitioner offered evidence that both an individual above him in the Bank's hierarchy (Mr. Oliosi) and individuals below him (Ms. St. Paul and Mr. Bisher) were not terminated after allegedly engaging in conduct comparable to his, the instruction did not disfavor petitioner. Given the fact that determinations of discriminatory intent cannot be made by adherence to strict formulas and that common sense is the best guide for a jury in attempting to find motivation, instructions to consider a multitude of facts (such as those by the trial court here) are all the more reasonable and appropriate. *See St. Mary's Honor Ctr.*, 509 U.S. at 517-18 (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983)).

Finally, the evidence adduced by the Bank established that, as a factual matter, under the Bank's policy, different levels of employees were held to different standards of conduct, thus making the district court's instruction entirely proper. Specifically, the testimony of a Senior Vice President of Human Resources and NatWest's employee handbook confirmed that it was NatWest's policy to hold senior officers, such as petitioner, to a higher standard of conduct than other lower-level employees. (Tr. 453:9-24.)

In view of this evidence and controlling authorities, the Second Circuit properly found that the district court did not err when it instructed the jury that it could permissibly consider the relative positions of the employees with whom petitioner compared himself when determining whether they were "similarly situated" to petitioner. Our research has revealed no decision holding or even intimating that the employment positions of individuals with whom a plaintiff contends he or she is "similarly situated" may not be considered in making that determination. The petition based on this argument should be denied.

B. The District Court Properly Instructed the Jury as to Petitioner's Burden of Proof

Petitioner does not take issue with the lower courts' statement of the law as enunciated in *Price Waterhouse* and its progeny. Rather, he objects to the manner in which the courts applied the law in view of the evidence offered by him at trial. Petitioner contends that the district court erred in refusing to give the burden-shifting "mixed motive" charge described in *Price Waterhouse v. Hopkins*, 490 U.S. 228. However, such a charge would have been entirely inappropriate given the evidence adduced at trial, and the trial court properly declined to so instruct the jury.

A "*Price Waterhouse* instruction" is appropriate only where the evidence establishes that an employment decision was "the product of a mixture of legitimate and illegitimate motives." 490 U.S. at 247. In order to require a *Price Waterhouse* "mixed motive" charge, a plaintiff must introduce "evidence of conduct or statements by persons *involved in the decisionmaking process* that may be viewed as *directly reflecting the alleged discriminatory attitude*, and that evidence [must be] sufficient to permit the factfinder to infer that that [factor] was more likely than not a motivating factor in the employer's decision." *Ostrowski v. Atlantic Mutual Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (emphasis added); *see also Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992).

In such a case, the petitioner has the initial burden of establishing by some type of direct proof that the "forbidden animus" was a motivating factor in an employment decision adverse to the plaintiff. *Ostrowski*, 968 F.2d 181-82 (citing *Tyler*, 958 F.2d at 1186); *see also Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993) (citing *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991)). Once this is accomplished, the

burden shifts to the employer to prove that it would have made the same decision even if it had not taken the illegitimate factor into account. *Id.*

It is for the trial court to make the initial determination as to whether petitioner had presented sufficient evidence directly reflecting a discriminatory motive such that the jury could reasonably conclude that petitioner's race was at least one of the motivating factors in the defendant's employment decision. *See Ostrowski*, 968 F.2d at 181 (plaintiff entitled to burden-shifting instruction only if sufficient evidence adduced to allow trier of fact to find both forbidden and permissible motives); *see also Henry*, 42 F.3d at 96 (plaintiff must adduce more than conclusory or unsubstantiated statements for disparate treatment claim to even reach jury). Here, the trial judge correctly concluded that petitioner had not crossed the required threshold to justify a mixed motive charge.

A review of the quantum and quality of evidence adduced in the *Price Waterhouse*, *Ostrowski* and *Tyler* cases is useful in illustrating the evaluation a trial court must make in determining whether sufficient evidence "directly reflecting the alleged discriminatory attitude" exists to warrant the burden-shifting instruction of *Price Waterhouse*.

In *Price Waterhouse*, a sex discrimination case relating to a failure to promote the plaintiff to a position of partner in her firm, this Court found that certain partners who voted against the plaintiff in her partnership bid were motivated by illegitimate factors, as follows:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as

> "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school." . . . But it was the man who [explained the partnership's decision to Hopkins] who delivered the coup de grace: in order to improve her chances for partnership, [he] advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

490 U.S. at 235.

Hence, this Court found that this blatant evidence of discriminatory motivation that was an integral part of the decision against extending a partnership offer to the plaintiff required the enunciation of a new, more onerous evidentiary standard in which the burden of persuasion shifted to the employer to show that it would have made the same decision even if it had not allowed the discriminatory factor to play a role. *Id.* at 244.

In *Ostrowski*, an Age Discrimination in Employment Act ("ADEA") action in which the plaintiff contended that he was terminated in retaliation for hiring and promoting older employees, the Second Circuit held that a *Price Waterhouse* charge was warranted. The *Ostrowski* plaintiff testified that his supervisor had stated with respect to two employees hired by plaintiff, " 'That's not the type of person that we want to hire. . . . That guy should have retired years ago,' " and " '[the employee] is not Atlantic [the employer]-type material' " and " 'should have stayed retired.' " There was also evidence that the supervisor noted those employees' ages before stating that they had no future in the company and could not contribute to it.

Finally, the supervisor complained that there were " 'no young, upcoming, promotable people [in the office due to plaintiff's] hiring practices.' " 968 F.2d at 174. Because this evidence (if believed) specifically connected age-related factors to the plaintiff's termination, the Second Circuit held that it was reversible error to fail to provide a mixed motive, burden-shifting charge to the jury.

Similarly, in *Tyler*, an ADEA plaintiff presented evidence that the memorandum recommending the plaintiff's layoff listed his age and years of service, the company had an approved category of employees it called the "Young Tiger" classification, and the company appraisals specifically referred to youth in a positive manner. *Tyler*, 958 F.2d at 1178. The Second Circuit again held that this type of evidence required the burden-shifting charge set forth in *Price Waterhouse*.

Clearly, the evidence proffered by petitioner herein did not come close to approaching this level of direct evidence of a discriminatory motive. Indeed, petitioner testified that *none* of his subordinates, peers or superiors ever made a comment to him about his race and that no one at National Westminster Bank ever harassed him or even told a racist-type joke in his presence. (*See* Tr. 74:6-75:12.) Likewise, the "evidence" cited by petitioner in support of his claim of error utterly fails to meet the required level of proof necessary to warrant the mixed motive charge.

The first purported evidence of mixed motivation identified by petitioner was his testimony concerning a statement allegedly made by respondent Goldman (which Mr. Goldman denied ever making (Tr. 902:20-903:9)) to petitioner while he was being interviewed that NatWest was "very vanilla" and that petitioner might "experience some unfair treatment based on [his] race." In

the next sentence of petitioner's testimony — tellingly omitted from the quotation in his brief — petitioner stated as follows:

> But, [Mr. Goldman] said, I will fly — I will never forget this — the aircraft carrier [*i.e.*, "air cover"] for you, in case of any unfair treatment based on race and *he assured me that I would be able to perform my duties without any adverse reactions or responses based on my origins.*

(Tr. 92:17-21) (emphasis added). Petitioner went on to testify that he was "delighted" that Mr. Goldman was "taking the first step" to hire qualified minorities and that it "made him feel great." (Tr. 93:1-5.)

Petitioner cannot possibly be heard to argue that these alleged statements indicating an affirmative action, *pro*-minority state of mind on the part of Mr. Goldman during petitioner's initial interview somehow constitute evidence that Mr. Goldman himself was unlawfully motivated when he concurred in the decision to terminate petitioner's employment six months later. If anything, even if the statements were made by Mr. Goldman, it would tend to prove that Mr. Goldman *did not* consider petitioner's race when he approved petitioner's termination. It is *not* evidence that Mr. Goldman was motivated by petitioner's race when he made that decision. In effect, petitioner has offered the exact opposite of the evidence required to support a mixed motive charge to the jury.

Given the fact that the very executives, Messrs. Oliosi and Goldman, who hired petitioner away from an officer-level position at Citibank, were the same individuals who decided to terminate his employment six months later, Mr. Goldman's alleged remarks about other unidentified persons' racial

attitudes had no probative value on the issue of their own "mixed motives."

The only other "evidence" offered by petitioner to attempt to substantiate his request for a mixed motive charge —asserted for the first time in the petition — is the alleged improper investigation by Ms. Hahn of others named in the anonymous letter reporting the stripper's appearance at petitioner's February 11 Meeting and her alleged failure to investigate the two lower-level employees present at other after-hours events at the Bank where dancers appeared.

This attempt to substantiate his request for a *Price Waterhouse* charge by offering disparate treatment evidence is completely misguided. Evidence that others were treated more favorably than petitioner, while relevant to a *McDonnell Douglas* pretext analysis, has no place in a discussion of *Price Waterhouse* mixed motivation. Such evidence is of no probative value on the issue of whether the decision to terminate petitioner's employment was the product of a mixture of legitimate and illegitimate motives as is required by *Price Waterhouse* and its progeny, because it does not establish that race was actually one of the factors considered when the decision was made to terminate petitioner's employment. Not surprisingly, the only "authority" cited by petitioner in connection with this flawed argument is *McDonnell Douglas* itself and *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980), which both predate *Price Waterhouse*. Needless to say, neither decision addresses mixed motivation terminations or the proper legal standard applicable in actions arising from such terminations.

In the absence of any direct evidence tending to show that petitioner's race was considered in any manner when Messrs. Oliosi and Goldman made the decision to terminate his employment, the trial court was entirely correct, and well within

its discretion, when it refused to instruct the jury on the burden-shifting analysis articulated in *Price Waterhouse*. So found the Second Circuit when it held that the district court had not abused its discretion in ruling that a mixed motive instruction was not required. Consequently, because there is no jurisdictional basis for Supreme Court review of the lower courts' application of this properly stated rule of law, the petition should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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